REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO 40 OF 2000

REPUBLIC……APPLICANT

VERSUS

GACHANJA & OTHERS……...…….....…….RESPONDENT

R U L I N G

The third accused person Francis Karioko Muruatetu is alleged to have made a statement under inquiry on 11th February, 2000 to Inspector Milton Kariuki.

When the Republic sought to produce the said statement in evidence, the learned counsel for the third accused objected thereto which step led to the holding of a trial within a trial. This ruling is in respect of the said trial.

The republic called three witnesses during the trial within a trial while the defence called five witnesses including accused number three. Learned counsel have also made their respective submissions which I have on record. Several authorities have been cited by counsel but I do not deem it necessary to specifically refer to any particular case. That however should not be construed as if the said authorities are wanting in substance.

I am alive to the provision of part 3 of the evidence act 80 Laws of Kenya, sections 25 to 32 thereof. This is a trial within a trial and a finding of whether or not the contested statement is a confession is yet to be made.

Section 26 of the Evidence Act is, however, relevant in these proceedings (of a trial within a trial) in that it relates inadmissibility of statements such as the one now under consideration if the making thereof appears to the court to have been caused by any inducement, threat or promise. All these factors would not be applicable unless they have:

> "… reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain advantage or avoid any evil of a temporal nature reference to the proceedings against him."

To appreciate what follows from this point, I have elected to set out in full the objection raised by Mr. Wandugi, the learned counsel for the third accused in respect of the said statement. He said.:

> "I object to the production of the statement primarily on the grounds that it was not voluntary. It is not my client's statement. It was extorted from him after about 24 hours of continuous and very brutal torture at CID headquarters and several other police stations and also parts of this country.

My client was brutalized during those 24 hours coersed to sign what is now purported to be his voluntary statement. Torture was even extended after the date of the said statement. My client disowns the statement in its entirety and will be asking the court to refuse its admission."

Going by the above address by the learned counsel for the third accused, two fronts present themselves. If the statement was extorted form the third accused he would be saying "Yes this is my statement but I was forced to make it". This is because, by definition, extortion means obtaining by force, threats or persistent demands. That is the first angle. If the accused disowns such a statement, he is said to have retracted the same.

The second angle is that, he is said not to have made any statement at all. In that case he has repudiated the statement. In cases of this nature an accused person cannot claim to advance both propositions. They are in my view incompatible. It is either one or the other.

I have then related that to the evidence adduced I.P. Milton Kariuki is the one who said he took the said statement. The accused had been escorted to him by sgt Njogu. He said he complied with the relevant units. The accused did not complain to him of any torture. The statement was voluntary. The accused signed and the officer countersigned. He denied that he was involved in the investigations or that he participated in torturing the accused as alleged.

Sgt Njogu was with the accused from the previous day when he was arrested until he was asked to escort him to record the statement. He also denied any allegations of torture attributed to him or any other police officers. Dr. Alex Onzere Kirasi Olumbe was called to give evidence on behalf of the republic in the trial within a trial. He examined accused three on 16th February, 2000 and filled his P3 for Mr. The only injury he noticed on the accused was a healing bruise on the lateral aspect of the left arm measuring 10cm in maximum extent. He found no evidence of any recent trauma. The approximate age of the hearing scar was 2 weeks which up to the date of the said examination would place it on 2nd February, 2000.

When Dr. Olumbe was shown the other reports relating to the same accused prepared by other medical officers, he was able to distinguish the same in relation to the injury he saw and the history presented to him by he accused.

The third accused on the other hand gave a chronology of what he went through in the hands of the police relating to extreme torture to extract a statement form him. These comprised denial of food, medicine and physical torture. He was also subjected to psychological torture in a forest near Bomas of Kenya where he said he was made to encounter a naked deadly body which was mutilated. This body was hot by the police in his presence. This type of torture was extended to a place off Kiambu Road and in the end he signed some papers the contents of which he did not know.

Dr Sureh. Dr Ochieng and Dr. Nganda were called to give evidence on behalf of the defence to prove the alleged torture of the third accused. Two physiotherapists were also called. These were Mr. Orina and Mr. Maina. Their reports were contested and eventually excluded from the record. In all, the medical reports presented by the defence witnesses there was particular emphasis on he swollen left shoulder. It is significant to note however, that, Dr. Nganda said it was the right shoulder but to him, it mattered not which shoulder was swollen. It all related to an assault on the third accused while he was in the police cells on 13th February 2000.

There was evidence that the third accused was involved in a traffic accident in 1988 wherein he was injured on the left shoulder. Be that at it may, at the end of he trial within a trial, it was the prosecution case against that of the defence.

I have had to go back and read the objection raised by the learned counsel for the third accused. If one were to draw an analogy with pleadings in civil proceedings, that objection would constituted the pleadings presented by the accused. But this is a criminal trial where the burden of proof is squarely on the republic to prove that the allegations raised by the third accused were not true and that the statement

was voluntary.

Of all the doctors and medical officers called to testify, it is Doctor Olumbe who saw the third accused first. This was on 16th February, 2000. Save for the healing scar he did not notice any other injury, neither did the accused complain of any torture. The other reports were prepared much later but related to injuries alleged to have been sustained on 13th February, 2000. If that were the case, it is hard to understand why the third accused did not complain to Dr. Olumbe of the said injuries. When shown some of those reports, Dr. Olumbe was emphatic that one would not be able to walk if such injuries were true.

I bear in mind that this is a trial within a trial and caution should be exercised in dealing with Evidence at this stage otherwise prejudice may be occationed on both sides. I am able to say however, that, most of the issues raised by the defence relating to the alleged torture were not put o the witnesses called by the republic so as to lay a foundation for the defence case. That would not be as if the burden of proof was being shifted.

There is then the demeanour of the witnesses who testified. I saw and heard each one of them. I believe the witnesses for the republic said the truth. I say no more at this stage.

And so, while I take judicial notice of the several allegations of torture attributed to the pol9ice in our judicial system, such allegations perse, are not sufficient to justify a blanket condemnation of the police. Proof of such allegations must be advanced. In the instant case, I find that this has not been done.

I now turn to the statement itself. The wording of the charge and caution has come under heavy criticism. I have, however, asked myself whether or not the third accused was misled as alleged. The answer lies in the body of the statement aforesaid. The statement runs into fourteen pages. Eleven of those contain what the third accused is allege to have told I.P Milton Kariuki. Reading through he said statement one cannot fail to note the salient details, a chain of consistency in terms of time, events and facts.

I have addressed the several contentious raised by the learned counsel for the defence. I believe this is a statement given by a person completely at home with himself. Looked at from the context of other evidence already adduced there is some co-relation but he evidential value thereof is not an issue at this stage.

I have noted the submissions on he cancellations, over writing etc raised by the defence yes these were not initialed; however these do not go to the root of whether or not the statement was voluntary.

I have said hereinabove that caution must be exercised at this stage as he trial is still in progress. Be that as it may, I am convinced that eh third accused made the contested statement. The same was made voluntarily and therefore it is admissible in evidence. I so find.

Dated and delivered at Nairobi this 27th day of September, 2001

A. MBOGHOLI MSAGHA

JUDGE